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IN THE

Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI, and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.p.A HOLOCAUST INSURANCE LITIGATION, SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, and EUGENIA SCHENCKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In exchange for benefits to the class that are minimal at best and illusory at worst, Settling Plaintiffs agreed to release all insurance claims of Holocaust survivors and their family members against Defendant Assicurazioni Generali, S.p.A. Under a generous assumption of the settlement's benefits, Generali will end up paying fewer than 6,000 of the 110,000-150,000 policies it sold to European Jews before WWII. Therefore, the overwhelming majority of the class members will have their rights foreclosed without any chance to receive a benefit under the settlement. The settling parties value the settlement at $35 million. The estimated minimum value of the policies that will remain unpaid is $2 billion. [SJA-81-82].[1]

The settlement is based, and adopts as legally final, the results of the International Commission for Holocaust Era Insurance Claims (ICHEIC). The insurers created ICHEIC in 1998 to be a voluntary tribunal in which companies would publish policy names and process claims using "relaxed standards" of proof, in a "nonadversarial" process. It was not binding unless

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[1] Economist Sidney J. Zabludoff, who consulted for the Jewish organizations in the International Commission for Holocaust Era Insurance Claims (ICHEIC), so stated in declarations filed below, A-230-31, SJA-77-86; A-347; A-463-65; SJA-79 and in testimony before the U.S. Congress. *See, e.g.* Statement of Sidney J. Zabludoff, "Holocaust Insurance Accountability Act of 2007," House of Representatives Committee on Financial Services, Feb. 7, 2008 (Zabludoff Statement), *http://www.house.gov/apps/list/hearing/financialsvcs_dem/press020708.shtml.*

a claimant accepted an offer. Generali and other companies entered the process pursuant to "agreements" limiting their total exposure without regard to the number or current values of unpaid policies. The policy values offered via ICHEIC were discounted far below true economic value.

ICHEIC accepted claims and inquiries through its deadline of December 2003. When it finished processing claims and closed in March 2007, ICHEIC had paid less than 3% of the $17 billion 2007 value of insurance policies owned by European Jewish families in 1938. [A- 230-31].

Originally there was no relationship between the Generali litigation and ICHEIC. But the settlement reached in August 2006 incorporated ICHEIC, as it was winding down, such that Generali would (1) pay claims that had been filed before the December 2003 deadline but which, if approved, would exceed the original $100 million limit, and (2) process "new claims" filed within a new four month window, using the eligibility criteria similar to (with valuations lower than) ICHEIC's.

Petitioners contend the settlement is unfair because it makes ICHEIC retroactively binding on all Generali insureds, beneficiaries, and heirs, the vast majority of whom will have their claims released for no consideration. This is unfair in principle, as ICHEIC was no more than a private administrative settlement mechanism of the kind this Court has rejected in *Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). The

unfairness of the settlement is exacerbated by ICHEIC's well-documented shortcomings in handling claims, publishing names, and other failures to treat claimants fairly.

Finally, granting of the writ requested presents no risk to those who might actually benefit from the settlement. Recently, to blunt progress of legislation to help survivors in Congress, Generali informed two Congressional committees that it will accept and process *any* claims according to ICHEIC standards, without regard for the class settlement filing deadline.[2] Therefore, this Court can assume jurisdiction over the case and correct the due process violations created by the settlement without harming any claimant who chooses to pursue a Generali claim using ICHEIC standards.

The issues presented are:

1. Whether the settlement violates Rule 23 and due process by releasing the claims of tens of thousands of Generali policyholders, beneficiaries, and heirs who have no opportunity to receive a benefit under the settlement;

2. Whether the settlement fails to satisfy Rule 23 (a) and (b) certification requirements of typicality, adequacy of representation, predominance, commonality, and superiority, under the standards of *Amchem* and *Ortiz*;

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[2] Letter from Assicurazioni Generali, S.p.A., to the Honorable Bill Nelson, Chairman, International Operations and Organizations, Democracy and Human Rights Subcommittee, Senate Committee on Foreign Relations, May 8, 2008.

3. Whether the class notice was adequate under Rule 23 and due process;

4. Whether the settling plaintiffs and Class Counsel adequately represented the interests of the class as a whole.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	v
TABLE OF APPENDICES	vii
TABLE OF CITED AUTHORITIES	viii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	13
I. The Settlement Violates Due Process and Rule 23 By Compromising Claims For No Consideration.	14
II. The settlement failed to satisfy Rule 23 (a) and (b) certification requirements of typicality, adequacy of representation, predominance, commonality, and superiority, under the standards of *Amchem* and *Ortiz*.	21

Contents

Page

III. The Notice Violates Due Process and Rule 23. 25

IV. The settling plaintiffs and Class Counsel did not adequately represented the interests of the class as a whole. 28

CONCLUSION 33

TABLE OF APPENDICES

Page

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated June 6, 2008 ..... 1a

Appendix B — Final Order And Judgment Of The United States District Court For The Southern District Of New York Dated January 7, 2008 ..... 6a

Appendix C — Summary Order Of The United States Court Of Appeals For The Second Circuit Filed October 2, 2007 ..... 13a

Appendix D — Final Order And Judgment Of The United States District Court For The Southern District Of New York Dated February 27, 2007 ..... 17a

Appendix E — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Filed September 15, 2008 ..... 24a

TABLE OF CITED AUTHORITIES

Page

Cases:

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) ..... *passim*

American Insurance Association v. Garamendi, 539 U.S. 396 (2003) 8, 12, 14

In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig., 228 F. Supp. 2d 348 (S.D.N.Y. 2002) 6

In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig., 340 F.Supp.2d 494 (S.D.N.Y. 2004) 8, 22, 28

Figueroa v. Sharper Image Corp., 517 F.Supp.2d 1292 (S.D.Fla. 2007) 33

In re Ford Motor Co. Bronco II Prod. Liab. Litig., 1995 WL 222177 (E.D.La 1995) 18

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir. 1979) 9

In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig., 55 F.3d 808 (1995) ... 18, 20, 22

Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) 19

Cited Authorities

Page

Mirfashi v. Fleet Mortgage Corp., 356 F.3d 781 (7th Cir. 2004) 17-18, 20

Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) .. 18, 20

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 26

National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir. 1981) 18

In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088 (5th Cir. 1977) 26

Ortiz v. Fireboard Corp., 527 U.S. 815 (1999) .. *passim*

Petruzzi's, Inc. v. Darling-Delaware Co., Inc., 880 F. Supp. 292 (M.D.Pa. 1995) 18

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 26

Piambino v. Bailey, 610 F.2d 1306 (5th Cir. 1980) 18, 20

Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002) 33

Cited Authorities

	Page
Rubin v. Assicurazioni Generali, S.p.A., __ Fed. Appx. __, 2008 WL 2329321 (2d Cir. (N.Y.) (Jun 06, 2008)	1
Synfuel Technologies, Inc., v. DHL Express, Inc., 463 F.3d 646 (7th Cir. 2006)	33
Twigg v. Sears, Roebuck & Co., 153 F.3d 1222 (11th Cir. 1998)	26
United States Constitution:	
Fifth Amendment	3
Seventh Amendment	3
Statutes:	
28 U.S.C. § 1254(1)	2
Rules:	
Federal Rule of Civil Procedure 23	*passim*
Federal Rule of Civil Procedure 23(a)	iii, 21, 22
Federal Rule of Civil Procedure 23(b)	iii, 21, 22
Federal Rule of Civil Procedure 23(c)(2)(B)	3

Cited Authorities

Page

Federal Rule of Civil Procedure 23(e)1)(A) 3

Federal Rule of Civil Procedure 23(e)(1)(B) 3

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State Department Bureau of European and Eurasian Affairs, "Report to Congress: German Foundation "Remembrance, Responsibility, and the Future," March, 2006 7

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http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=110_house_hearings&docid=f:41176.pdf, ... 12

www.hsf-usa.org 12

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The litigation involving Generali has generated several decisions. The ones directly relevant to this petition are the following:

The District Court's February 27, 2007 Final Order and Judgment approving the fairness of the settlement agreement, reproduced herein as Appendix D (17a-23a).

The Second Circuit's October 2, 2007 Summary Order vacating and remanding the District Court's February 27, 2007 decision, reproduced herein as Appendix C (13a-16a).

The District Court's January 7, 2008 Final Order and Judgment approving the fairness of the settlement after the remand by the Second Circuit, reproduced herein as Appendix B (6a-12a).

The Second Circuit's June 6, 2008 Summary Order affirming the District Court's January 7, 2008 Final Order and Judgment, published as *Rubin v. Assicurazioni Generali, S.p.A.*, __ Fed. Appx. __, 2008 WL 2329321 (2d Cir. (N.Y.) (Jun 06, 2008), and reproduced herein as Appendix A (1a-5a).

The Second Circuit's September 15, 2008 Order Denying Petitioners' Petition for Panel Rehearing or Rehearing *En Banc*, reproduced herein as Exhibit E (24a-25a).

JURISDICTION

The Second Circuit issued its Summary Order on June 6, 2008. Petitioners timely moved for Panel Rehearing or Rehearing *En Banc*, which were denied on September 15, 2008. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition raises federal questions arising under the Fifth and Seventh Amendments of the United States Constitution and Federal Rule of Civil Procedure 23. The particular provisions of Rule 23 at issue are Rule 23(a):

> "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class;"

Rule 23(c)(2)(B):

> "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice [which] must concisely and clearly state in plain, easily understood language: . . . that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3);"

Rule 23(e)1)(A): "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class;" Rule 23(e)(1)(B): "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

STATEMENT OF THE CASE[3]

The Petitioners, Jack Rubin, Alex Moskovic, David Mermelstein, Irene Mermelstein, Fred Taucher, Hans Lindenbaum, Hanna Hareli, and David Grinstein are all Holocaust survivors who lived in countries where Generali and its affiliates sold insurance prior to WWII. They applied to ICHEIC to recover insurance benefits from policies purchased by their parents and grandparents, and their claims were either denied or ignored for several years without resolution.

Generali is a one of the largest insurance companies in the world today, as it was prior to and during WWII. It was founded by Jewish merchants in Italy in 1831. Through its Trieste headquarters, European branches, and over 100 subsidiaries and affiliates, Generali aggressively marketed insurance to European Jews, especially in the countries of the former Austro-Hungarian Empire and Germany. After World War II, as Holocaust survivors and their families struggled to reconstruct their lives, Generali dishonored its obligations by demanding original policy documents and death certificates, denying the existence of policies or records, claiming its assets were nationalized, asserting statutes of limitations, and other fraudulent denials that frustrated Holocaust survivors and the heirs of Holocaust victims.

In the 1990s, after public disclosures about the thefts that abetted the Holocaust, survivors began speaking

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[3] References to the circuit court record are based on the appendices filed in the Second Circuit, Appeal No. 07-1380-cv, as follows. A- refers to the Joint Appendix; SUP- refers to the Supplemental Appendix of Plaintiffs-Appellants; and SJA- refers to the Supplemental Joint Appendix.

about family insurance policies. In 1997 and 1998, State insurance regulators and Congress held several hearings on the subject. Generali was one of the most commonly cited companies, as survivors recalled seeing papers or nameplates on buildings with Generali's signature winged Griffin (Lion of Judah) insignia, also a well-known Jewish symbol. After the war, survivors asked Generali to make good on the promises made to their loved ones, promises made in the face of growing evil. These were *insurance* policies, to *insure* their families' uncertain futures by paying a solid and respectable company like Generali. Yet the survivors also recounted the dismissive treatment they received from Generali and other insurers when trying to redeem the promises that Generali and others had made, and broken.

In 1998 and 1999, several states responded by passing laws requiring insurers to publish the names of policy holders from the Holocaust period and to pay claims, or else be subjected to lawsuits by rightful beneficiaries and heirs.

ICHEIC Formed to Protect Insurers

In 1998, in light of these developments, insurers created the International Commission for Holocaust Era Insurance Claims, or "ICHEIC." Under ICHEIC, insurers joined with state regulators and certain NGOs (not survivor groups or claimants' attorneys) to deal with the problem on a non-binding, "non-adversarial" basis. The values that ICHEIC determined would be paid for policies were politically determined through a negotiation, and policies from Germany and Eastern Europe were highly discounted.[4] ICHEIC was always understood by participants to be voluntary for all parties, unless an offer was made and accepted.

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[4] Zabludoff Statement, note 1, at 2-3.

ICHEIC was chartered under Swiss law and headquartered in London to avoid the reach of U.S. public records laws and judicial subpoena powers. It was funded by the insurers. Its meetings were conducted in secret and no minutes were published. Generali joined ICHEIC under an agreement which, as far as was publicly disclosed, limited the company's exposure to $100 million. ICHEIC was to be governed by "consensus," which Generali interpreted to mean it could reject any ICHEIC decision which it regarded as "unfair or unjust." *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, 228 F. Supp. 2d 348, 357 (S.D.N.Y. 2002) ("*Generali I*").

Litigation Against Generali.

In the late 1990s, survivors and heirs filed four civil "class actions" against Generali, two in the U.S. District Court for the Southern District of New York, and two in California State Court. Other individual cases were filed in California, Florida, New York, and Wisconsin. They were removed and transferred to the Southern District of New York by the Panel on Multidistrict Litigation. *Generali I*, 228 F. Supp. 2d 348, 349 n.1.

In 2001, Generali moved to dismiss the coordinated lawsuits to in favor European courts, or alternatively, resolution by ICHEIC. The District Court denied the motion, finding ICHEIC "clearly unsatisfactory." It held the insurers controlled the commission through its funding power and control over decisions, and called ICHEIC "the company store." *Generali I*, 228 F.Supp.2d at 355-57.

ICHEIC's tenure was tumultuous. It was criticized in the media and Congressional hearings between 2000 and 2003.[5] In 2003, Congress required the State Department to collect information on companies' claims practices and results, an obligation ICHEIC refused to comply with to this day.[6]

When ICHEIC closed its doors in March 2007, it had paid $250 million of the $17 billion in outstanding values of life/annuity/endowment policies estimated to

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[5] In 2002, Congressman Henry Waxman wrote:

> "Holocaust survivors have been waiting decades to reclaim Holocaust-era insurance policies. Unfortunately, the findings of an ongoing congressional investigation I initiated indicate that their wait is far from over. . . . The main cause of the failure to resolve claims appears to be the actions — and the inaction — of insurance companies. The majority of the companies that have agreed to the ICHEIC process have not lived up to their obligation to disclose policyholder lists. The ICHEIC member companies also appear to have wrongfully rejected, undervalued or left unanswered the claims of many survivors."

[6] *See* State Department Bureau of European and Eurasian Affairs, "Report to Congress: German Foundation "Remembrance, Responsibility, and the Future," March, 2006.: "The Department requested additional information from ICHEIC in an effort to meet the reporting requirements of Section 704(a)(3)-(7). ICHEIC Chairman Lawrence Eagleburger responded that he would not provide the Department of State any information regarding ICHEIC's undertakings."

be owned by European Jews in 1938. Generali had paid about $120 million on some 4500 policies, leaving over 100,000 policies uncompensated, with a 2007 value of at least $2 billion. SJA-77-86.

Garamendi Decision and Subsequent Dismissal of Plaintiffs' Cases.

In June 2003, in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) this Court held California's statute requiring insurers to disclose information about Holocaust-era insurance policies to the Insurance Department was preempted by Executive Branch policy, exemplified by executive agreements between the U.S. and Germany and Austria calling for their insurance companies to join ICHEIC. *Id.*, at 401-08, 420-23.

On October 14, 2004, the District Court in the Generali MDL granted Generali's renewed motion to dismiss. It held that under *Garamendi*, Executive policy supporting ICHEIC preempted survivors' state law claims against Generali, even though there was no executive agreement between the U.S. and Italy, and no evidence that U.S. foreign policy extended to opposing litigation against Generali. *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, 340 F.Supp.2d 494 (S.D.N.Y. 2004) ("*Generali II*").

All Plaintiffs appealed the District Court's October 2004 decision. On August 25, 2006, the lawyers in the New York class actions entered into a settlement agreement with Generali.[7]

[7] Several plaintiffs with pending appeals opted out of the settlement, Appeal Nos. 05-5602, 5612, et al. The Second Circuit (Con'td)

The Settlement

The settlement makes ICHEIC retroactively binding on all survivors and heirs with possible claims against Generali or its affiliates. It provides for Generali to (1) process and pay previously filed ICHEIC claims that were timely filed but not processed before Generali reached the $100 million level;[8] and (2) process "new claims" within a four-month period after the settlement. The settlement papers do not describe the status of the settling plaintiffs' (the "class representatives") claims against Generali, nor their ICHEIC experiences. The settlement also provided that Generali would be released as to all Holocaust Era insurance claims (except for opt-outs), and the class action will be "dismissed with prejudice." [A-52-75].

(Con'td)

held oral argument on their appeals on June 10, 2008, after which the Panel wrote a letter to the State Department asking "whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States." August 1, 2008 letter from Catherine O'Hagan Wolfe to the Honorable Conoleezza Rice. The State Department did not file a statement of interest, but the Department of Justice filed an ambiguous letter brief responding to the Court's inquiry, which the parties are now addressing. That briefing will be completed by January 15.

[8] Although Generali entered into a secret side agreement with ICHEIC that appears to say it will pay claims in excess of $100 million, A-615, there is correspondence from ICHEIC officials treating the limit as real. SJA-180. The burden to resolve this issue is on the settling parties. *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 (7th Cir. 1979).

Generali reviewed some 50,000 ICHEIC claims or inquiries between 1997 and 2007. It issued formal denials to 5,570 individuals, and made 4,568 offers. Notorious among the denials were cases in which Generali admitted that the claimants' family member purchased a Generali policy, but asserted the policy was paid or lapsed before 1936, even though Generali said it had no documentation of these transactions.

The 5,570 claimants who received formal denials have no chance to benefit from the settlement, which effectively makes prior denials legally binding. The 40,000-50,000 claimants who received no formal answer also have no chance of benefitting under the settlement, because if they resubmitted their claims with no new evidence, they would be denied again. Tens of thousands of policy holders whose families bought Generali policies but who either did not learn about ICHEIC at all, or who searched in vain because family names in company records were not published, or were published late, might not receive any benefit either, but all their claims will be released.

Petitioners Rubin, Taucher, Moskovic, Lindenbaum, and David and Irene Mermelstein challenged the settlement on numerous grounds, including the adequacy of the notice and other Rule 23 and due process concerns. The District Court approved the settlement on February 27, 2007. App-D; 17a-23a. On October 2, 2007, the Second Circuit vacated and remanded the District Court's decision because individual notice was not provided to claimants whose names were known to Generali. App.- C; 13a-16a.

On remand, the District Court rejected Petitioners' suggestions for a notice that clearly informed class members whose claims had been denied that their rights against Generali would be terminated if they did not exclude themselves. [SJA-8]. The Court instead approved the notice proposed by Class Counsel, which did not warn specifically that the settlement would be binding on a former unsuccessful claimant who submitted a new claim without additional proof. SJA-22.

After the new notice was disseminated, the original objector-appellants objected again, joined by two other class members, Hanna Hareli and David Grinstein of Israel.[9] They objected to the notice language, and the unfairness of the settlement that involuntarily imposed ICHEIC's unfair decisions on class members. They also argued that the notice was confusing, in that it included a claim form but not an opt out form, creating a natural pull suggesting to class members — including many who are elderly and speak foreign languages — that the Court endorsed the settlement and they had nothing to lose by filing a claim form. SJA-181-83.[10]

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[9] Approximately 50 class members had excluded themselves from the initial settlement, and an additional 256 class members filed opt-outs from the second notice.

[10] The December 2007 objections included information that emerged *after* the District Court's initial settlement approval that further contradicted many of the settling parties' representations in support of the settlement. [SJA-20]. As the amicus curiae law professors supporting the objectors to the Amchem settlement noted: "When settlement agreement can turn fiction into fact, there can be nothing left of the constraints imposed by Rule 23. 1997 WL 13605, at *3.

After a fairness hearing on January 7, 2008, the District Court again approved the proposed settlement as fair, reasonable, and adequate under Rule 23. [SJA-1-5]. The Court again said the deal was the only practical chance that some class members might have to see any money from Generali, dismissing the possibility of reversal in the appeal of the original dismissals, as well as the progress of legislation in Congress to reverse the effect of the *Garamendi* decision on survivors' insurance claims. SJA-65.[11]

Petitioners argued that the settlement unfairly releases tens of thousands of claims for no consideration, in exchange for the miniscule benefits for a few class members. The settling parties contended the releases were necessary in order to induce Generali to re-open the "new claims" claims window. Yet it was recently disclosed that in order to blunt the legislation in Congress, Generali promised two Congressional committees (and confirmed to the Second Circuit) *that it will continue to process claims, under ICHEIC standards notwithstanding the ICHEIC's conclusion and the deadlines of the class settlement.* Hence, the releases, and the settlement itself, are *completely unnecessary*, highlighting the due process violations caused by the judgment below.[12]

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11 Holocaust survivors, today the only U.S. citizens who cannot sue an insurance company that dishonors an insurance policy, are perplexed that their current government has failed them, but are fighting for restoration of their rights. *See www.hsf-usa.org.*

[12] *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:41176.pdf.*, at 180.

REASONS FOR GRANTING THE PETITION

The settlement will release of *tens of thousands* of Holocaust survivors and heirs of Holocaust victims with possible claims against insurance giant Assicurazioni Generali, S.p.A. ("Generali"), for no consideration. The mechanism for this miraculous escape from liability is the retroactive imposition of ICHEIC on claimants, known and unknown, who cannot recover any benefit under the settlement agreement. This kind of settlement violates well-settled precedent in this Court and in the circuit courts of appeal.

With conservative estimates that Generali sold 110,000 such policies that were in force in 1938, the ICHEIC results show fewer than 5,000 paid to date. Even if the "new claims" process of the settlement is successful pay an additional 1,000 claims (higher than class counsel's estimate), it would leave over 95 percent of the policies Generali sold to Holocaust victims unaccounted for – over 100,000 policies worth $2 billion. In contrast, the estimated value of the settlement is $35 million.

This settlement is a device to limit Generali's downside exposure if the District Court's 2004 dismissal of plaintiffs' cases is reversed by the Second Circuit, or if legislation is enacted clarifying federal law to allow survivors and heirs access to courts. It resembles the administrative settlement this Court has condemned in *Amchem* and *Ortiz* and that other federal circuits have similarly rejected because the circumstances do not satisfy the normal certification criteria of Rule 23, and because the claims of the vast majority of class members are wiped out for no consideration, by inadequate class representatives and class counsel, and without adequate notice.

In addition, the class notice was inadequate because it failed to apprise class members, especially those whose previous ICHEIC or Generali claims had been denied, that their rights against Generali would be eviscerated if they did not choose to exclude themselves from the settlement. In failing to so advise the class, the District Court in effect became a settlement advocate, in violation of its duty to protect the interests of absent class members.

Finally, there was a lack of adequate representation by the settling plaintiffs and class counsel. Class counsel abandoned a strong appeal of the initial dismissals of the claims under *Garamendi*, even though there has been no executive agreement between the U.S. and Italy, and no evidence that the U.S. policy cited by the Court in *Garamendi* extended to Generali. After being sharply critical of ICHEIC for years, Class Counsel effusively embraced ICHEIC as a framework for the settlement, despite evidence of its failures.

I. The Settlement Violates Due Process and Rule 23 By Compromising Claims For No Consideration.

Petitioners urge this Court to take jurisdiction of this case and hold that the settlement below, imposing ICHEIC mandatorily on all class members when the vast majority did not choose to be bound by it, and compromising the claims of most class members for no consideration, renders the settlement is invalid under *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 860-61 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591,

612 (1997), and cases from other circuits rejecting class settlements in which portions of the class were required to relinquish their rights for no benefit.

The scheme approved will release claims versus Generali by individuals such as Appellants who applied to ICHEIC in good faith and whose claims were arbitrarily denied without any opportunity for them to rebut Generali's denials with evidence they may have had in their records. It makes ICHEIC legally binding even though Petitioners and other claimants did not agree to be bound by it. The class action mechanism is not designed nor allowed to impose by compulsion, after the fact, a "settlement process" of a private, secret, foreign-based, star chamber system, unregulated by any court of governmental authority, established with an arbitrarily set limit on the funds available, and controlled by the entities who profited from betraying the promises made to Petitioners' parents, Holocaust victims no less.

Petitioners are typical of class members who tried to access ICHEIC after its creation in 1998, and whose claims were denied for reasons that they can not verify or trust. They had no ability to discover records or put Generali under oath, which is not consistent with the due process they would receive in a court with discovery, cross-examination, sworn testimony, and other safeguards. They clearly have no opportunity to benefit from the settlement, but would give a release to Generali based on a process they did not agree would be legally binding.

This includes class members whose Generali-ICHEIC claims were denied under the "negative evidence" rule, such as Petitioner Hanna Hareli. She is a Holocaust survivor from Israel (originally from Czechoslovakia). Generali did not dispute that her uncle, Jakob Weisz, purchased policy number 119,188 from the its Czech office in 1930. However, it denied her claim stating that its records in 1936 did not include any evidence that the policy was in force.

ICHEIC accepted Generali's contention that it lacked records to show what happened to the policy, but allowed it to deny the policy anyway. Rather than relaxing the burden for survivors, ICHEIC gave Generali greater protection than would U.S. courts, where the burden of proving the defense of payment is on the insurer.

Similarly, Petitioner Jack Rubin has no possibility of receiving any benefit under the settlement. His family was forcibly removed from their home in Vari, (Czechoslovakia, later Hungary) in April of 1944 and taken to the Beregsastz Ghetto, and then deported to Auschwitz, where his parents perished. When he returned from the camps, the family home and business were destroyed and he could not locate any records. In 2000, he informed ICHEIC that his family home and his father's general store had a sign affixed stating they were insured by "Generali Moldavia," [SUP-41]. His ICHEIC claim even identified the name of the agent, Joseph Schwartz, who "did not survive the Holocaust." *Id.*

Generali acknowledged that Generali Moldavia was its property insurance subsidiary in Hungary, but denied payment, admitting "the archives of the Generali company did not contain the water copies of the policies issued by subsidiaries." ICHEIC upheld the denial of any life insurance claim without demanding any records such as data on common customers between Generali Moldavia and any life insurance branch or subsidiary, or records about agents such as "Joseph Schwartz."[13] In court, Mrs. Hareli and Mr. Rubin (and the other petitioners) would have the benefit of discovery and sworn testimony to pursue their claims.

The decision below conflicts with well-settled precedent in this Court and in other circuits. *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 860-61; *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (Rule 23 "must be interpreted in keeping with the . . . Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge, or modify any substantive right. 28 U.S.C. Section 2071(b)"); *Mirfashi v. Fleet Mortgage Corp.*, 356 F.3d 781, 783-785 (7th Cir. 2004) (Posner, J.) (reversing settlement where one of the classes "received absolutely nothing, while surrendering all of its claims against" the defendant);

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[13] Petitioners Alex Moskovic (who identified relatives' names on the ICHEIC website), David and Irene Mermelstein, Fred Taucher, Hans Lindenbaum, and David Grinstein, were either denied with the notation "no match found," or did not receive any final response but were told ICHEIC would keep searching.

Molski v. Gleich, 318 F.3d 937, 955 (9th Cir. 2003) (reversal because consent decree released almost half the absent class members' claims with little or no compensation); *In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig.*, 55 F.3d at 808 (reversing coupon settlement in a case which likely provided no value to many class members, including lower income class members); *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (invalidating settlement as to class members who received no payments from the settlement fund); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 222177 (E.D.La 1995) (settlement disapproved because claims of plaintiffs who no longer drove Broncos would be extinguished for safety information of little or no value to them.); *Petruzzi's, Inc. v. Darling-Delaware Co., Inc.*, 880 F. Supp. 292, 299 (M.D.Pa. 1995)(rejecting settlement that benefited a subsection of the class in which 50% of the class would not receive premium certificates but would have their claims against defendant released).

Petitioners argued to the Second Circuit that in addition to *Amchem* and *Ortiz*, the settlement violated the rule of *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). The court rejected that argument on the ground that "there is no cap on the amount to be allocated among class members, and the ability to establish a valid claim constitutes the factual predicate for both the claims being released and claims being compensated." App. 4a. In this respect, the Court misconstrued Petitioners'

argument, which is that a court cannot impose on class members the results of a private settlement apparatus controlled and funded solely by the companies, retroactively eliminating the vast majority of class members' rights for no consideration.

The Court also misapprehended the Petitioners' argument in another respect, dismissing the argument that the settlement unfairly denies recovery to previously unsuccessful claimants because those class members "would not be barred" from submitting "new claims." But the reason prior claimants cannot benefit from the settlement is not because they cannot submit new claims. It is because it would be futile for them to try. Without new evidence, which virtually no Holocaust survivors have, the opportunity to resubmit a claim that will undoubtedly be denied is, by definition, no benefit.

Another group of class members whose claims would be released without the chance of receiving any benefit are those who lack knowledge of any possible claim due to the unique circumstances of the Holocaust, Generali's concealment of facts from policyholders and heirs for decades, and Generali's incomplete publication of policy holder names via ICHEIC. To the extent these "unknowing" class members have not filed claims, they are analogous to the exposed-only class members in *Amchem* whose injuries had not yet manifested.

As the Third Circuit noted in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 622 (3rd Cir. 1996), the "futures class action with no delayed opt-out rights,

notice to absent class members cannot meet the requirements of Rule 23 or the Constitution," as futures plaintiffs, inter alia, "may not know that they have been exposed to asbestos, even if aware of their exposure, have little reason to pay attention to class action announcements, and even if they find out about the class action, they lack adequate information to properly evaluate whether to opt out of the settlement."

Similarly, class members in this case with no knowledge of a Generali policy are similarly disadvantaged. They likely know they were part of a family affected by the Holocaust, but their relatives may have passed away without telling them about family policies. They might have looked on the ICHEIC website and seen nothing for their families because Generali published only a fraction of its names. Even if they received a notice, they might not understand that by receiving a claim form that Generali has only committed to matching names against the same database that yielded the partial disclosures, so when they submit the claim they are possibly signing away their rights against Generali. This is not adequate notice under Rule 23.

Another category of class member whose rights would be extinguished for no consideration, in violation of the principles of *Amchem*, *Ortiz*, *Mirfashi*, *Molski*, *and GM Pick Up Truck Fuel Tanks*, and *Piambino*, are people, estimated in this record to number in the tens of thousands, whose relatives bought policies from a former or current Generali subsidiary or affiliate. The definition of releasees under the settlement agreement includes "the Generali Group," which includes not only

Assicurazioni Generali, S.p.A. and its branch offices, but several dozen listed subsidiaries in Exhibit B to the Settlement Agreement *and their* subsidiaries and affiliates as well. SJA-32-33. But the claims processing mechanism agreed to by the Settling parties, the Policy Information Center (PIC), does not include the names of the policy holders of the subsidiaries and affiliates, or entities Generali acquired after WWII. A-347. That does not mean the information is not available; it just is not part of the settlement. So, class members whose family members bought policies from these entities will not benefit, but their claims would be released.

II. The settlement failed to satisfy Rule 23 (a) and (b) certification requirements of typicality, adequacy of representation, predominance, commonality, and superiority, under the standards of *Amchem* and *Ortiz*.

The ICHEIC system, with its arbitrary financial limits and lack of protections for most claimants, resembles in many material respects the kind of settlement scheme this Court has held violative of Rule 23 when done under court auspicies in *Amchem* and *Ortiz*. It follows that such a process having been conducted privately, cannot be accepted *after the fact* as a settlement mechanism under Rule 23.

Given the uneven and arbitrary treatment of claimants, the retroactive imposition of releases on individuals who had every reason to believe ICHEIC was voluntary even if a claim was denied, imposition of releases on people who would have no information, the

inadequacy of the notice to the "sprawling and amorphous class," if the District Court had examined this settlement from the certification standpoint, rather than simply as "a settlement," he would have found structural conflicts and other impediments to typicality, predominance, commonality, superiority, and adequacy of representation, and should have rejected this settlement. *E.g., In re General Motors Corp. Pick-Up Fuel Tank Products Liability Litig.*, 55 F.3d 768 (3rd Cir. 1995).

This settlement is similar to *Amchem* and *Ortiz,* as a way to salvage something for Class Counsel after the case had been dismissed, and a way for Generali to protect its downside in the event the *Generai II* decision is overturned.

The ICHEIC process incorporated into the settlement shares many of the very same procedural and substantive defects this Court has held violate Rule 23 and due process in *Amchem* and *Ortiz.* Those settlements were vacated even though conceived and supervised by the honest and careful efforts of U.S. district courts. ICHEIC was private, and controlled by Generali and the other companies, and the settlement was teed up by the settling parties for the federal court's imprimatur after Generali's "private settlement" system was nearly wrapped up. This Court has held such schemes violate Rule 23.

In *Ortiz*, there were three distinctive characteristics of a claims process historically accepted by the drafters

of Rule 23 as acceptable for class treatment in a "limited fund" case. The first was that the total of the fund available for satisfying aggregated liquidated claims had to be inadequate to pay all the claims. Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. 527 U.S. at 839. ("The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than seriatim litigation would have produced."). Third, the claimants with common theories of recovery were "treated equitably among themselves." *Id.*, at 840 ("Once the represented classes were so identified, there was no question of omitting anyone whose claim shared the common theory of liability and would contribute to the calculated shortfall of recovery.").

By incorporating ICHEIC, this settlement must be judged by the same standards, and it would fail all three elements of the *Ortiz* test. First, the amount of funds the companies supposedly made available through ICHEIC were artificially limited. When Generali joined ICHEIC its exposure was "agreed" to be capped at $100 million. But Generali is solvent, to say the least. It should not be treated like an estate in which the corpus of funds available was limited, as *Ortiz* requires.

In normal litigation, beneficiaries and heirs would have had access without limitation to Generali's treasury for payment of a fair value for policies plus punitive damages if warranted. Instead, ICHEIC established artificially low values for Generali and other policies, and ICHEIC officials pressured appellate arbitrators to

deny Generali claims because of the perceived limits in the pool of funds.[14]

The second criterion is equally skewed. Far from making sure that the class "as a whole" got the best recovery possible from the available funds, the opposite happened. The values offered to ICHEIC claimants, especially for the countries in Eastern Europe and Germany where Generali and its affiliates did business, were below their true values. German policies were paid at 15% of the rates of other West European countries, and the East European valuation rate set by ICHEIC was about "one-third of the conservative realistic current value." Zabludoff Statement, at 2, 3.

The very purpose of ICHEIC was to give insurance companies a better deal than seriatum litigation might have yielded for plaintiffs, with the supposed benefit of easing claimants' burdens as well. This was precisely the kind of formula this Court rejected in *Ortiz* due to the failure of the parties to satisfy Rule 23 certification requirements.

Third, the class members were not treated equitably among themselves. Only a fraction of Generali's policy holders' names were published, thereby arbitrarily limiting the ability of claimants to get payments. While

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[14] The irregularity of the procedure approved below is precisely what the *Amchem* objectors warned about to this Court: "Any tortfeasor could impose an administrative compensation scheme on its future victims by orchestrating a nationwide class action with the cooperation of compliant plaintiff attorneys." 1997 WL 13208, at *35.

some claimants received offers, others like Petitioners were subjected to arbitrary and inconsistent results that defined ICHEIC, or they never even learned about a family policy. ICHEIC was the antithesis of a system where equals were treated equally.

As this Court held in *Ortiz*, "this structure obviously implicates the Seventh Amendment jury trial rights" of absent class members," and so does the settlement structure under review. 527 U.S. at 846.

If ICHEIC were presented to a district court before the fact today with all its facts known, no court could approve it under *Ortiz*. It is no more worthy of being a settlement vehicle after-the-fact under Rule 23, and logically should be less so, when created and controlled by the defendant with the understanding that it would only apply if accepted by the claimants, yet now it is being retroactively imposed on unwilling class members.

III. The Notice Violates Due Process and Rule 23.

The Notice fails to satisfy due process and Rule 23 because it does not fairly and accurately apprise potential class members of their rights under the settlement, including the right of class members to object, to exclude themselves, and that they will be bound by the settlement if they do not exclude themselves. *Amchem*, 521 U.S. 591, 628 (1997) (class notice must provide class members with information "needed to decide intelligently, whether to stay in or

opt out.");[15] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227-28 (11th Cir. 1998) ("the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action") (quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

The Notice devised by the settling parties was confusing to the members of the class who will be releasing Generali if the settlement is approved, because most would not understand that prior ICHEIC denials will be legally binding on them, and their rights against Generali would be extinguished. Petitioners urged the Court to require a statement immediately after the sentence about new claims on the summary page, stating: "If your previous claim was denied or you received a "humanitarian payment" of $1,000 from ICHEIC, and you do not have any new information to support a new claim, your rights against Generali will likely be terminated under the settlement unless you follow the steps to exclude yourself."

However, the District Court rejected Petitioners' suggestion, accepting instead language from the settling parties, which stated simply that "any class member may submit a Claim Form even if a prior claim form was

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[15] Under *Amchem* it is doubtful that even the new notice ordered by the Second Circuit could be effective as to this "amorphous and undefined" group.

denied by ICHEIC. However, it is likely the claim will be denied again unless the Claim Form includes new information."

Petitioners also argued that the language of the Claim Form wrongly implied that claims may be validated based on anecdotal information, even though Generali's practice under ICHEIC had been to deny claims unless *both* (a) the applicant or Generali has documentary record of a claim, *and* (b) Generali determines that the claim is "valid" under its interpretation of ICHEIC rules, i.e. a policy was listed in the 1936 ledgers. The record shows that Generali's practice, eventually condoned by ICHEIC was *not* to approve claims based solely on anecdotal evidence.

The Notice approved was also defective because it gave the impression, with the "New Claim" forms attached to the mailed Notice, that the District Court itself was endorsing the settlement and encouraging recipients to file "New Claim" forms. Yet the filing of a new claim form is participation in the settlement, which would be prejudicial to the class members whose prior Generali or ICHEIC claims were denied.

For class members for whom the filing is a crapshoot because they had not previously been denied, the Notice is also misleading and incomplete. For example, as described by Petitioner David Grinstein, the Hebrew language notice received by class members in Israel is biased in favor joining in the settlement because it only contains only a Hebrew language *claim form* but no corresponding Hebrew language forms for opting or or lodging objections. [SJA-181-183]. According to social

worker Rizy Horwitz of NACHAS Healthnet, which serves a large segment of the Brooklyn Holocaust survivor community, survivors who received the Generali notice there were naturally inclined to file claims even though they have little or no idea about policies, because the nature of the process itself suggests that they will receive a payment, which most believe incorrectly will be $1,000. [SJA-186].

These assumptions are contrary to the reality of the situation, but the result is that many class members, like Ms. Horwitz's clients, who are overwhelmingly poor and not fluent in the English language, will lose their rights against Generali despite having no chance to benefit from the settlement. *Id.*

IV. The settling plaintiffs and Class Counsel did not adequately represent the interests of the class as a whole.

The entire settlement is inextricably tied to the representations made by the settling parties to justify the "settling plaintiffs'" surrender in the face of the pending appeals of the dismissal of the cases in *Generali II*. The Settlement Agreement maintained that ICHEIC was an appropriate settlement framework because it included organizations "representing" Holocaust victims, established "auditing standards and procedures," had "an appeal mechanism," and conducted an "extensive and world-wide publicity and notice campaign" to identify possible insurance claims related to policies issued in Europe before WWII. [A-54-55]. Most of these premises were not accurate.

ICHEIC published only a fraction of the names of Generali's corporate and branch offices, and none from its subsidiaries and affiliates. [SUP- 50-51]. Although ICHEIC conducted some independent archival research to augment the names the companies provided, it was inconsistent and incomplete.[16]

The settling parties cited ICHEIC audits as support for approval, [A- 365], yet prior to the initial Fairness Hearing, none of the ICHEIC audits were public. It was not until after the District Court initially approved the settlement that ICHEIC published its audits,[17] which revealed that the entity that handled all of the Generali claims between 2001 and 2004, had *failed.* [A-632].

Another ICHEIC safeguard was supposed to be the appeal mechanism, yet after the District Court approved the original settlement, former New York State Insurance Superintendent Albert Lewis, an ICHEIC appellate arbitrator, reported that he and other arbitrators were pressured by ICHEIC's legal office to

[16] In the Slovakian Central Property Office, for example, researchers examined a "small sample" of more than 700 boxes of records containing lists of "the assets of the firms and of their Jewish owners," yielding information on "18 policies." [A-210]. Several of the Petitioners lived in the Slovakia area of Czechoslovakia, including the Rubin, Mermelstein, Markovic, and Moskovic families, and their policies might have been found in those 700 boxes, but the effort, and others, were inexplicably limited.

[17] Class counsel conducted the "due diligence" inspection of the Generali Policy Information Center in Trieste without bringing their own translators or insurance experts. [A-191].

apply a "phantom rule" that imposed a heavier burden on claimants than ICHEIC's published rules, leading to denials of meritorious claims. SJA-147, 223.[18] Mr. Lewis also stated that ICHEIC officials were aware of the limits on total funds available from the companies, causing them to press for denials of claims. SJA-154-55, 180.[19]

ICHEIC's "relaxed standards of proof," also touted in the settlement, were commonly ignored, according to Lord Archer in a report to the ICHEIC Executive Management Committee, the Washington State Insurance Commissioner, and others. One of the most egregious tactics was the denial of claims where Generali acknowledged had a family policy, but denied payment without proving the policy was paid or lapsed. This form of rejection became known as the "negative evidence" rule and was approved by Chairman Eagleburger in June 2003. The record suggests that several thousand claims were denied on this basis.[20]

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[18] Petitioner Jack Rubin's claim was denied under this phantom rule.

[19] Mr. Lewis filed an *amicus curiae* brief in Appeal No. 07-1380.

[20] The New York Legal Assistance Group (NYLAG), which provides pro bono legal services to thousands of indigent New Yorkers also objected to the settlement on behalf of Holocaust survivors whose claims had been denied under the "negative evidence rule," and other inexplicable reasons, and submitted an *amicus curiae* brief in the Second Circuit opposing the settlement. SJA-267-72.

ICHEIC's membership did not include organizations "representing the interests" of victims of the World War II Holocaust." Though companies were present at all times, no survivors or heirs with claims, and no chosen representative of claimants participated. Moreover, the NGO leader supposedly representing victims' interests was Israel Singer, who in 2006 was barred by the New York Attorney General from participating in the management of the World Jewish Congress (one of the ICHEIC organizations) because he enriched himself with charitable dollars. SJA-67-76, 269-71, 274-78. The Claims Conference, also not a survivor organization, has been the subject of intense criticism by survivor groups for spending restitution money on board member projects while ignoring the needs of impoverished survivors. It is now under investigation by the Israseli Knessett, and was found by an Israeli court in 2008 to have defrauded Holocaust survivors. SJA-203-211, 212-13, 218-21, 238-41.

To convince the District Court to approve the settlement, Class counsel also supported Generali's untenable argument that it had no way to identify which customers were Jewish, and never provided Nazi and Axis authorities with information about Jewish customers. Despite categorical denials of both Generali and Class Counsel, Generali audit records show policies identified the "Jewish race" of the purchasers, insureds, and beneficiaries. SJA-257, A-450-52.[21]

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[21] ICHEIC never required Generali or any other company to produce their files of correspondence with Nazi and Axis authorities in which they turned over names and policy information about their Jewish customers.

There is also a substantial amount of information in the record showing Generali's fraud and deceit toward its Jewish policyholders. It has consistently misrepresented the full extent of unpaid Holocaust era policies, as well as the contents of its archives and quality of available information.[22] Generali claimed it suffered under Nazism when it actually flourished as one of the favored Axis insurers. [A-261-264]. Generali said that it could not pay survivors because its assets were "nationalized" after WWII, when in fact it had moved premium proceeds from Eastern European customers into U.S. real estate, corporate stock, and bank accounts, and entered into over 100 reinsurance agreements with U.S. reinsurers. A-261-264.[23] While Generali denied *Jewish* policyholders' claims due to supposed Soviet bloc nationalizations, it simultaneously told *non-Jewish* policyholders that expropriations in Socialist nations would "not adversely affect" their policies. [A-].

The District Court refused to consider the garish failures of ICHEIC and the misrepresentations made

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[22] Generali used IBM Hollerith cards and sorting equipment in its Trieste headquarters in the mid-1930s, is the same punch card and sorting system that Historian Edwin Black wrote in *IBM and the Holocaust* enabled the Nazis to identify, round up, and seize the assets of European Jews. *Id.*, at 34-37. *See* pages 1518-1524 of Joint Appendix in Appeal No. 05-5612.

[23] In 1946, Generali cited its reinsurance arrangements in Western markets and the risks posed to the capitalist system in its successful plea to Military authorities to be removed from the Allied Black List. Reinsurance records, which are comprehensive, were never investigated by ICHEIC. A-699-700.

by the settling parties. It approved the settlement in spite of these problems, stating that it was not his role to judge ICHEIC's performance. The Court realized that tens of thousands of claims would be lost but believed the opportunity for some "new claims" to be paid was worth it. [A-564-65]. In so doing, the District Court failed to exercise the degree of protection for absent class members required by Rule 23 and due process. *Synfuel Technologies, Inc. v. DHL Express, Inc.*, 463 F.3d 646 (7th Cir. 2006); *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002); *Figueroa v. Sharper Image Corp.*, 517 F.Supp.2d 1292 (S.D.Fla. 2007). In the settlement before this Court, the parties would sacrifice the rights of the many could be sacrificed so that a few could benefit.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant its writ of certiorari to the Second Circuit Court of Appeals and reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 6, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07-1380-CV

JACK RUBIN, ALEX MOSKOVIC, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, DAVID MERMELSTEIN,

Objector-Appellants,

-v.-

ASSICURAZIONI GENERALI S.P.A.,

Defendant-Appellee,

SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, EUGENIA SCHENCKER,

Plaintiff-Appellees.

June 6, 2008

Present: ROGER J. MINER, JOSÉ A. CABRANES, *Circuit Judges.**

* This case was originally before a panel consisting of Judges Miner, Cabranes, and the Honorable Thomas J. Meskill. In an order issued on October 2, 2007, the panel remanded the

(Cont'd)

Appendix A

SUMMARY ORDER

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiffs-appellants appeal from a January 7, 2008 order of the District Court (1) approving a settlement agreement providing for the release of plaintiffs' monetary claims against defendant-appellee Assicurazioni Generali S.P.A. ("Generali") and (2) entering final judgment in Generali's favor. On October 2, 2007, we vacated a prior order of the District Court approving the settlement agreement and remanded this matter so that appropriate individual notice of the proposed settlement could be given to class members in accordance with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-21, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). After notice was given pursuant to our October 2, 2007 order, the District Court held a fairness hearing and issued the January 7, 208 order approving the settlement agreement. We assume the parties' familiarity with the facts, procedural history, and scope of the issues raised.

(Cont'd)

matter under the procedures set forth in *United States v. Jacobson*, 15 F.3d 19 (2d Cir.1994). Judge Meskill passed away before this matter was re-submitted. Accordingly, the appeal is being decided by the remaining two members of the panel, who are in agreement. *See* 2d Cir. Interim R. 0.14(b).

Appendix A

Plaintiffs-appellants contend that the settlement agreement "is significantly broader than the scope of the possible benefits and beneficiaries of the settlement," Supp. Br. 50, because, *inter alia*, it releases claims held by class members who will not be compensated under the settlement because they have not filed claims.[1] On this basis, they argue that "the settlement [agreement] is invalid under *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981)." *Id.* at 52.

In *Super Spuds*, we invalidated a settlement on the grounds that (1) the underlying settlement agreement provided for release of two types of claim "in return for payments that were to be determined solely" based on of rights under one type of claim, 660 F.2d at 15; and (2) "the notice of settlement did not adequately apprise class members" that their second type of claim "[was] being placed on the block . . . in return [for nothing]," *id.* at 16; *see also Joel A. v. Giuliani*, 218 F.3d 132, 143 (2d Cir.2000) (noting that, in *Super Spuds*, we objected

1. Plaintiffs-appellants also contend that the settlement agreement unfairly denies recovery to individuals who previously filed unsuccessful claims with the International Commission for Holocaust Era Insurance Claims ("ICHEIC"). This concern is, however, belied by record evidence that individuals who had participated in the ICHEIC process would not be barred from submitting claims pursuant to the settlement agreement. *See, e.g.*, Supp. J.A. 22 (noting that "[a]ny Class Member may submit a Claim Form even if a prior Claim Form was denied by ICHEIC" but advising that "it is likely the claim will be denied unless the Claim Form includes new information"). Accordingly, we reject this claim as lacking in merit.

to the fact that "(1) a finite settlement fund was to be allocated among class members, and (2) claims of certain class members . . . were valued at zero in order to provide a higher payment to claims of other class members.").

The settlement agreement challenged in the instant case provides for release of all claims against Generali "resulting from or relating to any Insurance Policy," App. 65, in return for payments "based on a formula that takes into consideration amounts due on policies, currency conversion and interest. . . . ," *id.* at 119. There is no cap on the amount to be allocated among class members, and the ability to establish a valid claim constitutes the factual predicate for both the claims being released and claims being compensated. In addition, the record indicates that the notice provided to potential class members satisfied the requirements of due process, Federal Rule of Civil Procedure 23, and *Amchem Products*, 521 U.S. at 620-21. For these reasons, we conclude that it was not error for the District Court to approve the settlement. *Cf. TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982); *see also id.* at 460 ("As long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object to the fairness of the release, we see no reason why the judgment upon settlement cannot bar a claim that would have to be based on the identical factual predicate as that underlying the claims in the settled class action." (footnote omitted)).

Appendix A

Having considered all of plaintiffs-appellants' arguments on appeal and found them to be without merit, we AFFIRM the judgment of the District Court.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

APPENDIX B — FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 7, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL 1374
M 21-89 (GBD)

IN RE: ASSICURAZIONI GENERALI S.p.A.
HOLOCAUST INSURANCE LITIGATION

This Document Applies to:

CORNELL v. ASSICURAZIONI GENERALI S.p.A.
97 Civ. 2262 (GBD)

SCHENKER v. ASSICURAZIONI GENERALI S.p.A.
98 Civ. 9186 (GBD)

SMETANA v. ASSICURAZIONI GENERALI S.p.A.
00 Civ. 9413 (GBD)

FINAL ORDER AND JUDGMENT

This matter having come before the Court for final approval of the settlement between plaintiff class representatives Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, and Eugenia Schenker ("Plaintiffs") and Defendant Assicurazioni Generali S.p.A. ("Generale") and hearings having been held before this Court on

Appendix B

January 31, 2007, February 27, 2007 and January 7, 2008 following class notices and in accordance with a Settlement Agreement (the "Settlement Agreement") between Plaintiffs and Generali in the above-captioned actions (the "Actions"); and

Due notice of said hearings having been given in accordance with the Class Notices; the respective parties having appeared by their attorneys of record; the Court having heard and considered evidence in support of the proposed settlement of these actions (the "Settlement"); the attorneys for the parties having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the class notice; and notices to the Settlement Class certified in this action, including notice ordered by the Court of Appeals pursuant to its Summary Order of October 2, 2007, were adequate and sufficient and complied with the requirements of due process,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. "Settlement Class" and "Releasors" mean all persons worldwide, their heirs, executors, administrators, successors, beneficiaries and/or assigns, who (i) between 1920 and 1945 (the "Class Period"), purchased, or are the beneficiaries of life insurance, property insurance, and/or casualty insurance policies and/or annuities sold or issued by or through Generali (collectively "Insurance Policies"), (ii) have never been paid the proceeds of the Insurance Policies, accumulated

cash values and/or other policy benefits, including but not limited to death, disability and property benefits, (iii) are Holocaust Victims, and (iv) have not timely elected to be excluded from the Class. "Holocaust Victims" shall mean persons who were persecuted by the Nazis or their allies during the period 1933 through 1945, including Jews, Romanis, Jehovahs Witnesses, homosexuals, political dissidents and heirs of the foregoing.

2. The Class is hereby certified solely for settlement purposes, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, the Court having determined that this action meets all the prerequisites of Rule 23(a), and (b)(3) and (c) of the Federal Rules of Civil Procedure, including numerosity, predominance of common issues, and typicality, and that Plaintiffs and their counsel are adequate representatives of the Settlement Class. The Court finds:

a. The Settlement Class easily satisfies the numerosity requirements. The responses to the class notice, the requests for claim forms, the claim forms filed, and the payouts to over 700 claimants pending final approval are indicative that the class numbers into the thousands;

b. The commonality requirement is met for the Settlement Class since the three complaints allege multiple core issues of fact and law arising out of the same set of events which each member of the class would have to prove, including

Appendix B

i. Whether Generali sold Insurance Policies, and received periodic payments toward or under said Insurance Policies from persons who were persecuted by Nazi Germany or its allies?

ii. Whether Generali refused to pay policy proceeds, accumulated cash value and/or other benefits to Class members?

iii. Whether Generali refused to divulge information about the Insurance Policies to Class members?

iv. Whether Generali breached the Insurance Policies and/or duties owed to Class members?

v. Whether Generali converted payments or benefits of the Insurance policies?

vi. Whether Generali wrongfully transferred to persons designated by local or Nazi authorities or to local governments proceeds under the Insurance Policies?

vii. Whether, as a result of the foregoing Generali has been unjustly enriched?

c. The named plaintiffs are adequate class representatives based on the allegations of the three complaints since they fall within the Settlement Class,

have interests coextensive and not antagonistic to the interests of the Settlement Class, and have represented the interests of the Settlement Class for over 10 years;

d. Plaintiffs' Counsel named in the Order of Preliminary Approval are qualified to serve as Class Counsel based upon their prosecution of the litigation for over 10 years, their conduct at hearings, their written submissions and their experience in other Holocaust Era class actions; and

e. The common questions of law and fact listed above predominate, and class treatment is far superior to individual litigation.

f. The class definition is consistent with the claims asserted in the litigation and reasonably congruent with the payment of benefits under the Settlement Agreement.

3. Certification of the Settlement Class shall be solely for settlement purposes and without prejudice to the parties in the event the settlement does not take effect.

4. The parties modified the Settlement Agreement to extend the period of time for submission of claims based on documents recovered from the Bad Arolsen World War II Archive until June 30, 2008 or six months after the opening of the Archive, whichever is shorter. It appears from the Bad Arolsen website that its Archive opened on November 28, 2007, so the deadline for

submission of claims based on documents recovered from that Archive is May 28, 2008. Both the recent class notice and the updated settlement website reference the Archive's website which contains instructions on how to request searches.

5. The Settlement between Plaintiffs and Generali, as modified, is approved as fair, reasonable and adequate within the meaning of Fed. R. Civ. P. 23 and shall be implemented in accordance with the terms and conditions of the Settlement Agreement.

6. As to the Releasees only (as that term is defined in the Settlement Agreement) the Actions are dismissed on the merits and with prejudice against Plaintiffs and all members of the Settlement Class who have not validly and timely requested exclusion from the Settlement Class and without costs. Persons who validly and timely requested exclusion from the Settlement Class, who are listed in a submission of plaintiffs' counsel and on file with the Clerk of this Court, will not be bound by this Final Order and Judgment.

7. Pursuant to the terms of the Settlement Agreement, the Court awards incentive awards to Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, Eugenia Schenker each in the amount of $5,000 to be paid by Generali.

8. Without affecting the finality of this Order and Judgment in any way, this Court hereby retains continuing jurisdiction aver the Actions, including the

administration and consummation of the Settlement and Settlement Agreement and payment of counsel fees and costs. The Court appoints Class Counsel to supervise the processing and payment of claims and report to the Court thereon.

9. The Court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay. The Clerk of the Court is hereby directed to enter this Judgment without delay, as a final judgment of dismissal as to Generali.

Dated: New York, New York
January 7, 2003

SO ORDERED:

George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX C — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 2, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of a fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order an such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of October, Two thousand seven.

Appendix C

PRESENT:

HON. THOMAS J. MESKILL,
HON. ROGER J. MINER,
HON. JOSE A. CABRANES,
Circuit Judges.

No. 07-1380-cv

JACK RUBIN ET AL.,

Plaintiffs-Appellants,

-v.-

ASSICURAZINOI GENERALI S.P.A.,

Defendant-Appellee.

Appeal from a judgment of the United States District Court for the Southern District of New York (George B. Daniels, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **VACATED AND REMANDED** for further proceedings.

Plaintiffs-appellants appeal from a February 27, 2007 order of the District Court that approved a settlement agreement providing for the release of certain monetary

claims against defendant-appellee Assicurazinoi Generali S.P.A. ("Generali"). Because the notice of settlement provided to potential class members appears inadequate in light of the Supreme Court's comments in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997), we will remand, under the procedure set out in *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), so that appropriate notice may be given in an expeditious manner. Specifically, notice by first class mail should be sent to all class members whose names are known by Generali as of the date of this mandate whether or not such individuals have already filed a claim with Generali.

Accordingly, we VACATE the District Court's order of February 27, 2007, approving the settlement agreement entered into by plaintiffs-appellees and defendant-appellee, and REMAND the cause to the District Court for further proceedings consistent with this order.

We direct that the mandate be issued forthwith, providing for notice to be accomplished within sixty days of this order (November 26, 2007) and responses from interested parties to be submitted no later than thirty days thereafter (December 26, 2007). The District Court shall conduct a fairness hearing by no later than January 7, 2008. At that point, plaintiffs-appellants' appeal will be renewed in this Court. Plaintiffs-appellants will then have three weeks, that is, until January 29, 2008, to submit ally briefs to this Court. Appellees will have three weeks, that is, until February 19, 2008, to submit any response. Plaintiffs-appellants may submit a reply

thereto within no later than ten days, that is, on or before February 29, 2008. The matter will then be deemed resubmitted to this panel, which will resolve such further proceeding without oral argument unless otherwise ordered.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

By: s/ Oliva M. George
Oliva M. George, Deputy Clerk

APPENDIX D — FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 27, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL 1374
M 21-89 (GBD)

IN RE: ASSICURAZIONI GENERALI S.p.A.
HOLOCAUST INSURANCE LITIGATION

This Document Applies to:

97 CV 2262 (GBD)
CORNELL v. ASSICURAZIONI GENERALI S.p.A.

98 CV 9186 (GBD)
SCHENKER v. ASSICURAZIONI GENERALI S.p.A.

00 CV 9413 (GBD)
SMETANA v. ASSICURAZIONI GENERALI S.p.A.

FINAL ORDER AND JUDGMENT

This matter having come before the Court for final approval of the settlement between plaintiff class representatives Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, and Eugenia Schenker ("Plaintiffs") and Defendant Assicurazioni Generali S.p.A. ("Generali")

and a hearing, pursuant to this Court's Order of October 31, 2006 (the "Notice and Hearing Order"), having been held before this Court on January 31, 2007 and continued on February 27, 2007, in accordance with a Settlement Agreement (the "Settlement Agreement") between Plaintiffs and Generali in the above-captioned actions (the "Actions); and

Due notice of said hearing having been given in accordance with the Notice and Hearing Order; the respective parties having appeared by their attorneys of record; the Court having heard and considered evidence in support of the proposed settlement of these actions (the "Settlement"); the attorneys for the parties having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Court's Notice and Hearing Order; and notice to the Settlement Class certified in this action pursuant to the Notice and Hearing Order was adequate and sufficient and complied with the requirements of due process,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. "Settlement Class" and "Releasors" mean all persons worldwide, their heirs, executors, administrators, successors, beneficiaries and/or assigns, who (I) between 1920 and 1945 (the "Class Period), purchased, or are the beneficiaries of life insurance, property insurance, and/or casualty insurance policies and/or annuities sold or issued by or through Generali

(collectively "Insurance Policies"), (ii) have never been paid the proceeds of the Insurance Policies, accumulated cash values and/or other policy benefits, including but not limited to death, disability and property benefits, (iii) are Holocaust Victims, and (iv) have not timely elected to be excluded from the Class. "Holocaust Victims" shall mean persons who were persecuted by the Nazis or their allies during the period 1933 through 1945, including Jews, Romanis, Jehovahs Witnesses, homosexuals, political dissidents and heirs of the foregoing.

2. The Class is hereby certified solely for settlement purposes, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, the Court having determined that this action meets all the prerequisites of Rule 23(a), and (b)(3) and (c) of the Federal Rules of Civil Procedure, including numerosity, predominance of common issues, and typicality, and that Plaintiffs and their counsel are adequate representatives of the Settlement Class. The Court finds:

a. The Settlement Class easily satisfies the numerosity requirements. The responses to the class notice, the requests for claim forms, the claim forms filed, and the payouts to over 700 claimants pending final approval are indicative that the class numbers into the thousands;

b. The commonality requirement is met for the Settlement Class since the three complaints allege multiple core issues of fact and law arising out of the

same set of events which each member of the class would have to prove, including:

i. Whether Generali sold Insurance Policies, and received periodic payments toward or under said Insurance Policies from persons who were persecuted by Nazi Germany or its allies?

ii. Whether Generali refused to pay policy proceeds, accumulated cash value and/or other benefits to Class members?

iii. Whether Generali refused to divulge information about the Insurance Policies to Class members?

iv. Whether Generali breached the Insurance Policies and/or duties owed to Class members?

v. Whether Generali converted payments or benefits of the Insurance Policies?

vi. Whether Generali wrongfully transferred to persons designated by local or Nazi authorities or to local governments proceeds under the Insurance Policies?

vii. Whether, as a result of the foregoing, Generali has been unjustly enriched?

c. The named plaintiffs are adequate class representatives, based on the allegations of the three complaints, since they fall within the Settlement Class, have interests coextensive and not antagonistic to the interests of the Settlement Class, and have represented the interests of the Settlement Class for almost ten (10) years;

d. Plaintiffs' Counsel, named in the Order of Preliminary Approval, are qualified to serve as Class Counsel based upon their prosecution of the litigation for almost ten (10) years, their conduct at hearings, their written submissions and their experience in other Holocaust Era class actions; and

e. The common questions of law and fact listed above predominate, and class treatment is far superior to individual litigation.

f. The class definition is consistent with the claims asserted in the litigation and reasonably congruent with the payment of benefits under the Settlement Agreement.

3. Certification of the Settlement Class shall be solely for settlement purposes and without prejudice to the parties in the event the settlement does not take effect.

4. The parties have twice modified the Settlement Agreement (a) to extend the deadline for submission of New Claims until March 31, 2007 and (b) to extend the

period of time for submission of claims based on documents recovered from the Bad Arolsen World War II Archive until June 30, 2008 or six months after the opening of the Archive, whichever is shorter. If the Archive is not opened by May 1, 2008, claims based on documents obtained from the Archive may still be made if received by Generali within sixty (60) days of such opening, but no later than August 31, 2008.

5. The Settlement between Plaintiffs and Generali, as modified, is approved as fair, reasonable and adequate within the meaning of Fed.R.Civ.P. 23, and shall be implemented in accordance with the terms and conditions of the Settlement Agreement.

6. As to the Releasees only (as that term is defined in the Settlement Agreement) the Actions are dismissed on the merits and with prejudice against Plaintiffs and all members of the Settlement Class, who have not validly and timely requested exclusion from the Settlement Class, and without costs. Persons who validly and timely requested exclusion from the Settlement Class, who shall be listed in a submission by Plaintiffs' Counsel filed with the Clerk of this Court, will not be bound by this Final Order and Judgment.

7. Pursuant to the terms of the Settlement Agreement, the Court awards incentive awards to Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, Eugenia Schenker each in the amount of $5,000 to be paid by Generali.

8. Without affecting the finality of this Order and Judgment in any way, this Court hereby retains continuing jurisdiction over the Actions, including the administration and consummation of the Settlement and Settlement Agreement and payment of counsel fees and costs. Plaintiffs' Counsel shall supervise the processing and payment of claims and report to the Court thereon.

9. The Court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay. The Clerk of the Court is hereby directed to enter this Order and Judgment without delay as a final judgment of dismissal as to Generali.

Dated: New York, New York
February 27, 2007

SO ORDERED:

s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 15, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of September two thousand and eight,

ORDER

No. 07-1380-cv

Jack Rubin, Alex Moskovic, Irene Mermelstein, Fred Taucher, Hans Lindenbaum, David Mermelstein

Objector-Appellants,

v.

Assicurazioni Generali S.P.A.,

Defendant-Appellee,

Appendix E

Samuel Hersly, Agnes Heyman, Paola Oreffice Kulp, Eugenia Schencker,

Plaintiff-Appellees.

Appellants Jack Rubin, Alex Moskovic, Irene Mermelstein, David Mermelstein, Fred Taucher, Hans Lindenbaum, Hanna Hareli and David Frinstein having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk